STATE OF MICHIGAN

COURT OF APPEALS

EDGAR W. PUGH, JR., Personal Representative of the Estate of SIDNEY J. SUO, Plaintiff-Appellee, v MICHELENE M. CROWLEY, Defendant-Appellant.	UNPUBLISHED April 8, 2014 No. 313471 Macomb Circuit Court LC No. 2012-002756-CK

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right the circuit court's order of October 4, 2012, confirming the arbitration award and entering judgment for plaintiff consistent therewith in the amount of $28,788.37. We affirm.

I

The facts of this case are largely undisputed. In 2006, defendant hired plaintiff's decedent, attorney Sidney J. Suo ("Suo"), to represent her in an underlying divorce action. On June 4, 2006, defendant and Suo executed a retainer agreement ("the agreement"). Among other things, the agreement set Suo's fee at $195 per hour and required defendant to pay an initial retainer of $2,500. The agreement also provided:

> **ARBITRATION**. Any dispute arising out of the attorney's representation of the client, including any provision of this agreement, shall be submitted to and settled by arbitration, in accordance with and pursuant to the rules of the American Arbitration Association and the applicable Michigan statutes. This is called "statutory arbitration" and is governed by MCL 600.501 *et seq*. The Circuit Court for the County of Macomb shall enter a judgment with respect to the arbitration award.

Defendant failed to pay Suo for various legal services performed in the divorce action. Suo then died during the pendency of the case. On October 13, 2010, the Macomb County Probate Court appointed plaintiff as personal representative of Suo's estate.

Plaintiff discovered that defendant owed significant unpaid legal fees to Suo's estate. Plaintiff sued defendant in the district court to recover these unpaid fees. Defendant refused to accept service of process and plaintiff was compelled to seek the district court's approval of alternate service. After alternate service was effectuated, defendant still refused to answer or appear. The district court entered a default judgment against defendant.

Acting *in propria persona*, defendant then moved to set aside the district court's default judgment. She argued that the arbitration clause in the agreement divested the district court of jurisdiction over the collection matter. The district court ultimately agreed with defendant, concluding that it had lacked jurisdiction to consider plaintiff's claims or enter the default judgment. The district court set aside the default judgment, dismissed the collection matter for want of jurisdiction, and referred the parties to arbitration.

Plaintiff's counsel filed a request for arbitration with the American Arbitration Association ("AAA"). AAA sent out letters notifying the parties that an arbitrator had been appointed and the matter had been scheduled for briefing. On April 5, 2012, defendant participated in a telephone conference with plaintiff's counsel and the arbitrator. The arbitration hearing was scheduled for May 18, 2012. Defendant notified the arbitrator that she had "no usable mail delivery address." Accordingly, the arbitrator ordered that any communications for defendant would be delivered to the office of plaintiff's counsel, where defendant could collect them.

At 4:58 p.m. on May 17, 2012, the day before the scheduled arbitration hearing, attorney Brad Danek notified AAA's business office by e-mail that he had been retained to represent plaintiff. Danek requested a seven-day adjournment of the arbitration hearing. The AAA case manager e-mailed back at 5:10 p.m., informing Danek that AAA was "[not] able at this late date to get in touch with the arbitrator" and that "the hearing is still going forward at 9:00 a.m. tomorrow morning—at the arbitrator's office."

Defendant appeared with Danek at the arbitration hearing on the morning of May 18, 2012. Before the hearing commenced, defendant moved for an adjournment, alleging that she had never received service of plaintiff's claim for arbitration, proposed witness list, and proposed exhibit list. She claimed that her due-process rights were being violated by the arbitration proceedings. The arbitrator denied defendant's motion, finding that defendant's reasons for seeking an adjournment were invalid and unreasonable, and that defendant's non-receipt of U.S. mail was entirely "self-imposed." The arbitrator again reminded defendant that he had set up an alternate method for serving papers and communications on her, allowing her to pick them up at the office of plaintiff's counsel.

After hearing the testimony and reviewing the evidence, the arbitrator determined that the arbitration clause in the agreement was "legal and binding" and "was adequately reviewed and explained by Mr. Suo" at the time it was executed on June 4, 2006. The arbitrator concluded that defendant had failed to pay various legal fees which had become due during the underlying divorce case, that she had no valid defense which would excuse the payment of these fees, and that she owed Suo's estate $26,763.37 in principal and interest. On May 22, 2012, the arbitrator entered an award consistent with his findings and conclusions.

Once again acting *in propria persona*, defendant prepared a complaint seeking to vacate the arbitration award. Defendant filed this complaint on June 12, 2012, commencing Macomb County Circuit Case No. 2012-002672-CZ. However, the complaint was not served on plaintiff until September 10, 2012.[1]

Unaware of defendant's yet-unserved complaint in Macomb County Circuit Case No. 2012-002672-CZ, plaintiff commenced the instant action on June 15, 2012, by filing a complaint to confirm the arbitration award. Together with his complaint, plaintiff filed a motion requesting that the circuit court confirm the arbitration award and convert it into a money judgment. After numerous attempts, plaintiff was unable to personally serve defendant with his summons, complaint, and motion. The circuit court ultimately authorized the use of alternate service. Plaintiff sent his summons, complaint, and motion to defendant's last known address via certified mail, and also posted the documents on defendant's front door on August 28, 2012. At that same time, plaintiff posted a notice that his motion to confirm the arbitration award would be heard by the circuit court on September 24, 2012.

As noted previously, defendant's complaint in Macomb County Circuit Case No. 2012-002672-CZ was not served on plaintiff until approximately two weeks later, on September 10, 2012.

On September 21, 2012, three days before the scheduled hearing of September 24, 2012, plaintiff filed a prehearing memorandum reciting the facts of the case and briefing the merits of his motion. Plaintiff pointed out that defendant had not yet answered his complaint and that he had not been served with defendant's complaint in Macomb County Circuit Case No. 2012-002672-CZ until September 10, 2012. Plaintiff argued that the circuit court should treat defendant's complaint in Macomb County Circuit Case No. 2012-002672-CZ as a responsive pleading for purposes of the instant case.

The circuit court's hearing on plaintiff's motion to confirm the arbitration award went forward as planned on September 24, 2012. Plaintiff and defendant were both present and offered arguments at the hearing. Defendant informed that court that "[p]resently I am not getting mail." The circuit court construed defendant's complaint in Macomb County Circuit Case No. 2012-002672-CZ as a responsive pleading for purposes of the case under consideration. After hearing the parties' arguments, the circuit court noted that it would grant plaintiff's motion to confirm the arbitration award and would convert the award into a money judgment against defendant in the amount of $28,788.37. Plaintiff's counsel agreed to submit a proposed order to this effect under the seven-day rule of MCR 2.602(B).

On the day of the hearing, defendant filed a handwritten motion in which she observed that she had not yet answered plaintiff's complaint. She argued that, pursuant to MCR 2.108(A)(2), she was entitled to 28 days, rather than 21 days, to answer plaintiff's complaint and that the hearing was therefore premature.

[1] Macomb County Circuit Case No. 2012-002672-CZ was ultimately dismissed by the circuit court on November 13, 2012.

On October 4, 2012, the circuit court signed and entered plaintiff's proposed order confirming the arbitration award and converting it into a money judgment in the amount of $28,788.37. Six days later, on October 10, 2012, defendant filed a handwritten objection to the order of October 4, 2012, claiming that "[t]he . . . order does not follow the wording that the Court agreed to."

Then, on October 25, 2012, defendant filed a motion for reconsideration, raising several arguments. Defendant first argued that she had filed her complaint in Macomb County Circuit Case No. 2012-002672-CZ on June 12, 2012, three days before plaintiff filed his complaint in the instant case on June 15, 2012. Thus, defendant argued that her complaint should not have been construed as a *responsive* pleading. Defendant also argued that plaintiff's prehearing memorandum, dated September 21, 2012, was untimely because it was filed only three days before the scheduled hearing. See MCR 2.119(C)(1)(a). She next argued that because plaintiff's complaint was not posted on her front door until August 28, 2012, she had until September 25, 2012, to answer it. See MCR 2.108(A)(2) (allowing a defendant 28 days, rather than 21 days, to answer a complaint that has been served by registered mail). She contended that the hearing of September 24, 2012, was improperly conducted fewer than 28 days after service of the complaint. Next, defendant argued that plaintiff was required to file his motion to confirm the arbitration award in Macomb County Circuit Case No. 2012-002672-CZ, which was already pending, instead of filing his own complaint in the instant action.[2] Lastly, defendant argued that plaintiff's counsel had misled her and failed to provide her any details concerning the hearing of September 24, 2012, when she called him on the telephone.

In an opinion and order dated November 2, 2012, the circuit court denied defendant's motion for reconsideration. The court explained that although defendant had filed Macomb County Circuit Case No. 2012-002672-CZ on June 12, 2012, she had not served her complaint on plaintiff until September 10, 2012, three months after plaintiff commenced the present action and two weeks after plaintiff served his complaint on August 28, 2012. The court noted that "[t]he record is devoid of any evidence suggesting that plaintiff was aware of [Macomb County Circuit Case No. 2012-002672-CZ] when he commenced and defendant was served with [the complaint in] this action." The court explained that plaintiff had attached defendant's complaint from Macomb County Circuit Case No. 2012-002672-CZ to his prehearing memorandum and that it had been construed as defendant's responsive pleading. Accordingly, the court explained, there had been no need to adjourn the hearing of September 24, 2012, to give defendant additional time to answer plaintiff's complaint. The court also determined that even if plaintiff's prehearing memorandum was untimely and the hearing of September 24, 2012, was held prematurely, defendant had suffered no prejudice. Lastly, the court observed that defendant had set forth no substantive defenses to the confirmation of the arbitration award.

[2] Defendant failed to mention the fact that plaintiff had been unaware of her complaint in Macomb County Circuit Case No. 2012-002672-CZ, which she had not served on him until September 10, 2012.

Defendant subsequently filed a motion for relief from judgment and an emergency motion for reconsideration. Plaintiff attempted to collect on the circuit court's judgment by way of execution and garnishment. Several writs of garnishment were served, but all were returned unsatisfied. Defendant thereafter failed to appear for a creditor's examination and a bench warrant was issued for her arrest. The circuit court ultimately denied defendant's motion for relief from judgment and emergency motion for reconsideration. The court then stayed all further proceedings, including the creditor's examination and plaintiff's attempts to collect on the judgment, pending this appeal.

II

Defendant first argues that, pursuant to MCR 2.108(A)(2), she had until September 25, 2012, to answer plaintiff's complaint. Accordingly, she contends that the circuit court erred by prematurely holding its hearing on September 24, 2012. We conclude that any error in this regard was harmless.

We review de novo as a question of law whether the circuit court has properly applied the timing requirements set forth in the court rules. See *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

The parties appear to agree that plaintiff's complaint was served when it was posted on defendant's front door on August 28, 2012. It is true that under MCR 2.108(A)(2), defendant had 28 days, rather than 21 days, to answer plaintiff's complaint. In other words, defendant had until September 25, 2012, to file her answer. The circuit court's hearing of September 24, 2012, was therefore conducted one day before the expiration of the answer period.

However, defendant had deliberately avoided service of plaintiff's summons, complaint, and motion for several months. According to unrebutted affidavits contained in the circuit court file, plaintiff had first attempted to serve his summons, complaint, and motion in June 2012, but was thwarted by defendant's numerous efforts to avoid service of process and to refuse to accept the delivery of mail.

At the time of the hearing on September 24, 2012, it was apparent that defendant had not drafted an answer to plaintiff's complaint; nor was she prepared to file an answer by the close of business on the following day, September 25, 2012. Instead, defendant merely argued that the hearing should be postponed to allow her to draft an answer. But she offered no specific explanation for her delay in answering the complaint, which had been posted on her door 27 days earlier. Nor did she explain when she might provide an answer to plaintiff and the court.

While the hearing of September 24, 2012, was technically conducted one day early, we conclude that defendant suffered no prejudice thereby. After the hearing, plaintiff's counsel presented a proposed order pursuant to the seven-day rule of MCR 2.602(B). Yet during the next seven days, defendant raised no objections to the proposed order, which was ultimately signed and entered by the court on October 4, 2012. See MCR 2.602(B)(3)(a). Nor did defendant

explain how the substance of her answer, had it been filed, would have differed from that of her complaint in Macomb County Circuit Case No. 2012-002672-CZ.[3] Indeed, to this day, defendant has never submitted a proposed answer or explained what assertions would have been contained in her answer. The circuit court's decision to go forward with the hearing on September 24, 2012, albeit one day before the expiration of the 28-day answer period of MCR 2.108(A)(2), did not result in prejudice or adversely affect defendant's substantial rights. See MCR 1.105. "[A]bsent a showing of prejudice resulting from noncompliance with the rules, any error is harmless." *Baker v DEC Int'l*, 218 Mich App 248, 262; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247 (1998).

III

Defendant next argues that the circuit court erred by considering plaintiff's untimely prehearing memorandum, which was served only three days before the scheduled hearing of September 24, 2012. Again, we conclude that any error was harmless.

Defendant correctly points out that under MCR 2.119(C)(1)(a), plaintiff was required to serve his motion to confirm the arbitration award, the notice of the hearing on his motion, and any supporting brief at least nine days before the scheduled hearing. Defendant argues that plaintiff's prehearing memorandum was a "supporting brief" within the meaning of MCR 2.119(C)(1)(a) and therefore should have been served by September 15, 2012. Even assuming arguendo that the prehearing memorandum constituted a "supporting brief" within the meaning of the court rule, however, it is clear that any violation of the rule was de minimus in this case. Defendant was served with plaintiff's motion to confirm the arbitration award and the notice of the hearing on plaintiff's motion on August 28, 2012. Moreover, defendant was already aware of the essential content of plaintiff's memorandum, which was substantially similar to the content of plaintiff's previously served complaint and motion to confirm. We conclude that any violation of the timing requirements of MCR 2.119(C)(1)(a) was harmless and did not adversely affect defendant's substantial rights. See MCR 1.105; see also *Baker*, 218 Mich App at 262.

IV

Defendant further argues that the circuit court erred by confirming the arbitration award because she was "fraudulently induced to sign the retainer agreement that contained the arbitration clause." In particular, she contends that Suo fraudulently misrepresented the nature of the arbitration process and the meaning of the word "arbitration" at the time the agreement was executed by the parties.

[3] As explained previously, in the absence of an answer from defendant, the circuit court treated defendant's complaint in Macomb County Circuit Case No. 2012-002672-CZ as a responsive pleading for purposes of this case. We perceive no abuse of discretion in the circuit court's decision to treat defendant's complaint as an answer. See *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992).

This argument, which has been raised for the first time in defendant's brief on appeal, is not preserved for appellate review. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992); see also *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 444; 695 NW2d 84 (2005). At any rate, we note that it was defendant, herself, who insisted on enforcement of the arbitration clause before the district court. Error requiring reversal must be that of the trial court, not error to which the aggrieved party has contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964). Moreover, the arbitrator specifically found that the arbitration clause was "legal and binding" and "was adequately reviewed and explained by Mr. Suo" at the time it was executed on June 4, 2006. These findings of fact by the arbitrator are not judicially reviewable in this Court. *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009); *Byron Center Pub Schools Bd of Ed v Kent Co Ed Ass'n*, 186 Mich App 29, 31; 463 NW2d 112 (1990). We perceive no error requiring reversal.

V

Lastly, defendant argues that the circuit court should have vacated the arbitration award pursuant to MCR 3.602(J)(2)(a) because it was "procured by fraud." Once again, she contends that Suo fraudulently misrepresented the nature of the arbitration process and the meaning of the word "arbitration" at the time the agreement was executed.

As already explained, the arbitrator specifically determined that the arbitration clause "was adequately reviewed and explained by Mr. Suo" at the time it was executed by the parties. This factual finding is not judicially reviewable. *Washington*, 283 Mich App at 672; *Byron Center*, 186 Mich App at 31. Nor are there any errors apparent on the face of the arbitration award itself. *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001). Other than claiming that Suo misrepresented the nature and meaning of arbitration, defendant makes no effort to explain how the award was fraudulently procured. This Court will not rationalize the basis for defendant's undeveloped claim or search for authority to sustain it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).[4]

[4] Defendant contends that because she initiated Macomb County Circuit Case No. 2012-002672-CZ on June 12, 2012, three days before plaintiff commenced the present action on June 15, 2012, the present action should have been dismissed pursuant to MCR 2.116(C)(6). We acknowledge that "[a]ctions are initiated in Michigan upon the filing of a complaint, and not upon service of process." *Fast Air, Inc v Knight*, 235 Mich App 541, 544; 599 NW2d 489 (1999). Thus, it is technically true that Macomb County Circuit Case No. 2012-002672-CZ was pending when plaintiff commenced this action. However, it is undisputed that plaintiff was unaware of defendant's complaint in Macomb County Circuit Case No. 2012-002672-CZ until September 10, 2012. Further, defendant's complaint in Macomb County Circuit Case No. 2012-002672-CZ merely attacked the sufficiency of service prior to the arbitration hearing and the arbitrator's eventual findings of fact. Defendant's refusal to accept service prior to the arbitration hearing was calculated and deliberate and could not have provided a basis to vacate the arbitration award. Moreover, the arbitrator's findings of fact were not judicially reviewable. *Washington*, 283 Mich App at 672. Accordingly, while we recognize that there was another case initiated and pending

VI

We note that defendant's appeal borders on frivolous and is largely devoid of legal merit. In the exercise of our discretion, we decline to sanction defendant or dismiss her appeal. See MCR 7.216(A)(10) and (C)(1)(a). However, we caution defendant that any future appeals must be well-grounded in fact and law and pursued in conformance with the rules.

Affirmed. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

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at the time the present action was commenced, the purposes of MCR 2.116(C)(6) would not have been served by the dismissal of this action. *Fast Air*, 235 Mich App at 546.